U.S. Department of Labor

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Issue Date: 31 July 2006

CASE NO.: 2005-BLA-05039

In the Matter of

BENNY R. HARRIS,
Claimant,

v.

SHAMROCK COAL CO., INC.,
c/o JAMES RIVER COAL CO.,
Self-insured Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party in interest.

Appearances:

MONICA RICE SMITH, Esq.
For Claimant

LOIS A. KITTS, Esq.
For Employer

Before:

JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a living miner's claim for benefits under the Black Lung Act, 30 U.S.C. §§901-945 ("the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title. [1]

[1] The Department of Labor ("DOL") has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at C.F.R. Parts 718, 722, 725, and 726 (2002). They are applicable to all claims pending, on, or filed after that date. See 20 C.F.R. §718.101(b)(2001); 20 C.F.R. §725.2(c)(2001). The United States Court of Appeals for the District of Columbia has upheld the validity of the revised regulations. See National Mining Assoc. v. Department of Labor, 292 F.3d 849 (D.C. Cir. 2002).

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

On October 6, 2004, this case was referred to the Office of Administrative Law Judges ("OALJ") for a formal hearing. Subsequently, the case was assigned to me. I held a formal hearing on May 9, 2006, in Hazard, Kentucky, at which time the parties had full opportunity to present evidence and argument.

I. ISSUES

(1) Whether the claim was timely filed;

(2) Whether the miner has pneumoconiosis pursuant to 20 C.F.R. §718.202;

(3) Whether the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203;

(4) Whether the miner is totally disabled pursuant to 20 C.F.R. §718.204; and

(5) Whether the miner's pneumoconiosis contributed to his total disability pursuant to 20 C.F.R. §718.204.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

Benny R. Harris ("Claimant") filed a claim for black lung benefits with the United States Department of Labor, Office of Workers' Compensation Programs ("OWCP") on December 23, 2003. DX-2. By Proposed Decision and Order dated July 22, 2004, the District Director, OWCP ("the Director"), denied the claim. DX-26. In that Order, the Director credited Claimant with twenty-one (21) years of coal mine employment and named Shamrock Coal Company ("Employer") as responsible operator. Id. However, the Director denied benefits because it was determined that Claimant did not establish total disability. Id. By correspondence dated July 27, 2004, Claimant requested a formal hearing before the OALJ in order to contest the Director's denial of benefits. DX-27.

On October 6, 2004, Claimant's claim was referred to the OALJ for a formal hearing. DX-31. The case was subsequently assigned to me and by Notice of Hearing issued January 30, 2006, I scheduled a hearing for May 9, 2006 in Hazard, Kentucky. At the hearing, the Director's exhibits[2] 1 through 33 and Employer's exhibits[3] 1 through 8 were identified and received into the

[2] Denoted as "DX-1" through "DX-33."
[3] Denoted as "EX-1" through "EX-8."

record. Claimant testified[4] at the hearing and the parties declined to submit closing briefs in this matter. Tr. at 32.

All evidence of record has been carefully and thoroughly considered. The following Decision and Order is based upon consideration of a thorough analysis of the evidence of record, the arguments of the parties and the applicable law.

B. Factual Background

1) Stipulations of the Parties

The parties entered into the following stipulations during the formal hearing held before me:

1. Twenty-one (21) years of coal mine employment. Tr. at 5.

2. Benny Harris was a miner. Tr. at 5.

3. Post 1969 employment. Tr. at 6.

4. Shamrock Coal Company is the proper responsible operator. Tr. at 6.

I find that these stipulations are supported by the record.

2) The Claimant's Testimony (Tr. at 14-30)

The Claimant testified that he was born on October 9, 1938. He married Betty Harris in 1976. Tr. at 15. Claimant and Betty legally adopted their grandchild, Winston Tate Harris, on March 13, 2006. CX-1; Tr. at 16. Winston and Betty are Claimant's only dependants. Tr. at 16.

Claimant began working in the mines in July, 1981, when he worked outside with Don Smith. Tr. at 17. After a short time, Claimant began working underground for Shamrock Coal, where he worked until the end of July, 2002. Tr. at 17. All of his work for Shamrock Coal was underground. Tr. at 18. He ran a miner for ten (10) years in which he "just cut coal and load[ed] cars." Tr. at 18. Claimant performed various jobs that involved heavy lifting. Tr. at 19-20.

Claimant left his job in July of 2002 because they took him "out of the coal [he] was working and put [him] in real low coal" where he would have to crawl. Tr. at 20. He was given an ultimatum to either work the new coal or leave. Tr. at 20. Since Claimant had sustained an earlier injury to his arm and shoulder, he decided to quit. Tr. at 21. He has not worked in the coal industry since. Tr. at 21-22.

Claimant testified that he currently suffers from shortness of breath and as a result can no longer hunt or cut the grass. Tr. at 24; 27. He currently uses inhalers and takes vitamins which are prescribed by Dr. George Chaney. Tr. at 24.

[4] The hearing transcript of May 9, 2006 shall be denoted as "Tr. at -."

Claimant testified that he has a smoking history of about fifteen (15) years off and on. Tr. at 27. He smokes about a half a pack a day. Tr. at 28. On cross-examination he testified that he smoked his first cigarette at the age of twelve (12). Tr. at 29. He began smoking on a regular basis at the age of eighteen (18). Tr. at 30.

C. Timeliness of the Claim

Employer raised the issue of whether the claim was timely filed. I find that it is timely. Pursuant to the Act and regulations, a claim for benefits must be filed within three years after a medical determination of total disability due to pneumoconiosis is communicated to the Miner. See 20 C.F.R. §725.308. The regulations provide that "there shall be a rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. §725.308(c); Tennessee Consolidated Coal Co. v. Kirk, 264 F.3d 602, 606 (6th Cir. 2001) ("Claims for black lung benefits are presumptively timely"). The party opposing entitlement must demonstrate that the claim is untimely and there are no "extraordinary circumstances" under which the limitation for filing should be tolled. Daugherty v. Johns Creek Elkhorn Coal Corp., 18 B.L.R. 1-95 (1994).

Claimant filed his claim on December 23, 2003. Therefore, the record must contain evidence that he was made aware by a physician that he was totally disabled due to pneumoconiosis prior to December 23, 2000. The record before me contains no such evidence. Accordingly, I find that the instant claim was timely filed.

D. Entitlement

Benefits are provided under the Black Lung Act for miners who are totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(a). "Pneumoconiosis" is defined as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 20 C.F.R. §718.201(a). Because this claim was filed subsequent to January 19, 2001, Claimant's entitlement to benefits will be evaluated under the revised regulations set forth at 20 C.F.R. Part 718. In order to establish entitlement to benefits under Part 718, Claimant bears the burden of establishing the following elements by a preponderance of the evidence: (1) the miner has pneumoconiosis, (2) the pneumoconiosis arose out of coal mine employment, (3) the miner is totally disabled, and (4) the miner's pneumoconiosis contributes to his total disability. 20 C.F.R. §725.202(d)(2)(i)-(iv); See Director, OWCP v. Greenwich Colliers, 512 U.S. 267 (1994); Perry v. Director, OWCP, 9 B.L.R. 1-1, 1-2 (BRB 1986).

1) Whether the Miner Has Pneumoconiosis

A finding of the existence of pneumoconiosis is determined pursuant to 20 C.F.R. §718.202. In addition, the regulations permit an ALJ to give appropriate consideration to "the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis." 20 C.F.R. §718.107(a). Finally, the Benefits Review Board ("the Board") has held that all evidence relevant to the existence of pneumoconiosis must be considered and weighed. Mabe v. Bishop

Coal Co., 9 B.L.R. 1-67 (1986) (the Board upheld a finding that the claimant had not established the existence of pneumoconiosis even where the X-ray evidence of record was positive).

20 C.F.R. §718.202(a) Evidence

There are four means of establishing the existence of pneumoconiosis set forth at 20 C.F.R. §§718.202(a)(1) through (a)(4):

(1) X-ray evidence: §718.202(a)(1).

(2) Biopsy or autopsy evidence: §718.202(a)(2).

(3) Regulatory presumptions: §718.202(a)(3):

(a) §718.304 - Irrebuttable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

(b) §718.305 - Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of totally disabling respiratory or pulmonary impairment.

(c) §718.306 - Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978 and was employed in one or more coal mines prior to June 30, 1971.

and

(4) Physician's opinions based upon objective medical evidence: §718.202(a)(4).

The following is a discussion of the §718.202(a) evidence of record:

a. Chest X-Ray Evidence - §718.202(a)(1).

Under §718.202(a)(1), the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with §718.102.[5] An ALJ may utilize any reasonable method of weighing the X-ray evidence. Sexton v. Director, OWCP, 752 F.2d 213 (6th Cir. 1985). Generally, a physician's qualifications at the time he/she renders an interpretation should be considered. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32 (1985). It is well established that it is proper to credit the interpretation of a dually qualified (B-Reader and BCR) physician

[5] A B-reader ("B") is a physician who has demonstrated a proficiency in assessing and classifying X-ray evidence of pneumoconiosis by successful completion of an examination conducted by the United States Public Health Service. 42 C.F.R. §37.51 A physician who is a Board-certified radiologist ("BCR") has received certification in radiology of diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §727.206(b)(2)(iii) (2001).

over the interpretation of a physician who is solely a B-Reader. Zeigler Coal Co. v. Director, OWCP [Hawker], 326 F.3d 894 (7th Cir. 2003) (complicated pneumoconiosis); Cranor v. Peabody Coal Co., 22 B.L.R. 1-1 (1999) (en banc on recon.); Sheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). The Board has also held that greater weight may be accorded the X-ray interpretation of a dually qualified physician over that of a physician who is only a BCR. Herald v. Director, OWCP, BRB No. 94-2354 BLA (Mar. 23, 1995) (unpublished). In addition, an ALJ is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The current record contains the following chest X-ray evidence:

Date of X-Ray	Date Read	Exhibit No.	Physician	Radiological Credentials	Film Quality	Interpretation
(1)						
01/15/04	01/15/04	DX-10	Simpao	None	1	2/3
01/15/04	02/07/04	DX-11	Barrett	B-Reader; BCR	1	Quality reading
01/15/04	06/09/04	DX-13	Halbert	B-Reader; BCR	2	0/0
(2)						
06/14/04	06/14/04	EX-1	Rosenberg	B-Reader	1	0/0
06/14/04	06/14/04	EX-4	Poulos	B-Reader; BCR	1	No evidence of pneumo.

As the preceding table demonstrates, two X-rays of Claimant's chest were performed and are in evidence. The first X-ray was performed on January 15, 2004 and was read by three physicians. Dr. Valentino S. Simpao, M.D., read the X-ray on the date it was administered and interpreted it as Category 2/3 positive for pneumoconiosis. In contrast, Dr. Dennis Halbert, M.D., who read the X-ray on June 9, 2004, interpreted it as category 0/0 negative for pneumoconiosis. Dr. Peter J. Barrett read the X-ray for quality purposes only. Dr. Halbert is a dually-qualified physician while Dr. Simpao is neither a B-Reader nor a Board-certified radiologist. As such, I accord Dr. Halbert's opinion more weight and find that this X-ray is negative for pneumoconiosis.

The second X-ray was taken on June 14, 2004 and read on the same day by both Dr. David M. Rosenberg, M.D., and Dr. Alexander Poulos, M.D. Both physicians are B-Readers and Dr. Poulos is also a Board-certified radiologist. Dr. Rosenberg classified the X-ray as Category 0/0 negative for pneumoconiosis while Dr. Poulos reported that there was no evidence of coal workers' pneumoconiosis. Accordingly, I find that the June 14, 2004 X-ray is negative for pneumoconiosis.

The preponderance of the X-ray evidence clearly weighs in favor of a finding of no pneumoconiosis. I find that Claimant has not established the presence of pneumoconiosis through the X-ray evidence.

b. Biopsy or autopsy evidence - §718.202(a)(2).

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. 20 C.F.R. §718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

c. Regulatory presumptions - §718.202(a)(3).

A determination of the existence of pneumoconiosis may also be made by using the presumptions described in §§718.304, 718.305, and 718.306. Section 718.304 requires X-ray, biopsy or equivalent evidence of complicated pneumoconiosis which is not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. §718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. Since none of these presumptions are applicable, the existence of pneumoconiosis has not been established pursuant to 20 C.F.R. §718.202(a)(3).

d. Physicians' opinions - §718.202(a)(4).

The fourth way to establish the existence of pneumoconiosis under §718.202(a) is set forth as follows in subparagraph (4):

> A determination of the existence of pneumoconiosis may also be made if a physician exercising sound medical judgment, notwithstanding a negative X-ray, finds that the miner suffers or suffered from pneumoconiosis as defined in §718.201. Any such finding shall be based on objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Section 718.201(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical', pneumoconiosis and statutory, or 'legal', pneumoconiosis."

The record contains the following physicians' opinion evidence:

Dr. Valentino S. Simpao, M.D. (DX-10)

Dr. Simpao performed a complete OWCP pulmonary evaluation of the Claimant and documented his findings in a report dated January 15, 2004. DX-10. In that report, Dr. Simpao observed that Claimant suffered from a moderate cardiopulmonary impairment. DX-10 at 23. He opined that "multiple years of coal dust exposure is medically significant in [Claimant's] pulmonary impairment. Id. This is a diagnosis of "legal pneumoconiosis" under the regulations. See 20 C.F.R. §718.201(a)(2).

Dr. David M. Rosenberg, M.D. (EX-1; EX-2)

Dr. Rosenberg summarized his examination of the Claimant on June 14, 2004 in a written report dated March 30, 2006. EX-1. The doctor documented his review of Dr. Simpao's evaluation, and the results of a pulmonary function test ("PFS"), an arterial blood gas study ("ABG"), a chest X-ray, and an EKG. EX-1 at 1. Dr. Rosenberg reported that based upon his interpretation of the chest X-ray he performed and Claimant's PO_2 values on his ABG study, the Claimant does not have clinical coal workers' pneumoconiosis. EX-1 at 3. Dr. Rosenberg also opined that Claimant did not suffer from legal pneumoconiosis. EX-1 at 3. This was based on Dr. Rosenberg's finding that Claimant demonstrated no significant obstruction on the PFS administered by him. Dr. Rosenberg also explained that, with regards to the evaluation performed by Dr. Simpao, "it should be noted the pulmonary function tests from January 15, 2004 were performed with incomplete efforts based on the shape of the flow-volume and volume-time curves; they were not accurate to assess a degree of impairment." EX-1 at 2.

Dr. Rosenberg testified by deposition on April 27, 2006. EX-2. He acknowledged that Claimant's history of exposure to coal dust history was sufficient for a susceptible individual to contract coal workers' pneumoconiosis. EX-2 at 20. However, based upon his evaluation, Dr. Rosenberg opined that Claimant did not have coal workers' pneumoconiosis. EX-2 at 21.

Dr. Matthew A. Vuskovich, M.D. (EX-3)

Dr. Vuskovich prepared a report dated April 17, 2006. EX-3. He disclosed that he reviewed the evaluations and findings of Drs. Simpao and Rosenberg. Based upon Dr. Rosenberg's interpretation of the June 14, 2004 X-ray, Dr. Vuskovich opined that "it is likely that [Claimant] did not have clinical coal workers' pneumoconiosis." EX-3 at 10. In regards to legal pneumoconiosis, Dr. Vuskovich opined, "the effects of active cigarette smoke exposure confounds (mixes with) the effects of coal dust exposures to the extent that a coal dust effect cannot be detected." EX-3 at 10.

20 C.F.R. §718.107(a): "Other Medical Evidence"

20 C.F.R. §718.107(a) allows an ALJ to give appropriate consideration to the results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis. The party submitting the test or procedure bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits. C.F.R. §718.107(b).

Dr. Jerome F. Wiot, M.D., authored a report dated April 5, 2006, in which the doctor interpreted the results of a CT scan performed on Claimant's chest on May 31, 2005 at the Lexington Clinic. EX 5. Dr. Wiot explained that "CT is medically acceptable for evaluation of pulmonary problems. CT is beneficial in confirming or denying the presence of simple coal workers' pneumoconiosis, and can be beneficial in recognizing complicated coal workers' pneumoconiosis when it is not evident on routine chest X-rays." EX-5. I find that this statement by a Board-certified radiologist, EX-8, is sufficient to meet Employer's burden of establishing that the CT Scan is medically acceptable and relevant in this matter.

Dr. Wiot interpreted the CT Scan as showing "no evidence of coal workers' pneumoconiosis. There are emphysematous changes present. There is old inflammatory disease at the extreme left apex with a small bullae. The chest is otherwise unremarkable." EX-5.

Weighing the Medical Evidence

As I have previously found, the preponderance of the X-ray evidence of record weighs in favor of a finding of no pneumoconiosis. That evidence is supported by the CT Scan evidence of record. Dr. Wiot, a Board-certified radiologist, found no evidence of pneumoconiosis in his reading of the CT Scan. Claimant declined to offer evidence to rebut that interpretation. Therefore, the only evidence that purports to establish a finding of pneumoconiosis is the medical report of Dr. Simpao.

Dr. Simpao found clinical pneumoconiosis in his reading of the January 15, 2004 X-ray but that reading has since been rebutted by the reading of Dr. Halbert, a physician with more expert qualifications. Dr. Simpao also found legal pneumoconiosis (he diagnosed Claimant with a moderate cardiopulmonary impairment arising from multiple years of coal dust exposure) based upon a PFS he administered and Claimant's work history. Dr. Simpao's diagnosis is directly contradicted by the medical report of Dr. Rosenberg. As did Dr Simpao, Dr. Rosenberg personally evaluated Claimant. In addition, Dr. Rosenberg reviewed Dr. Simpao's evaluation, and disagreed with his assessment of the results of the pulmonary function study. Dr. Rosenberg explained that the PFS administered by Dr. Simpao was "not accurate to assess a degree of impairment" because of incomplete effort by the Claimant. He then further explained that "when [Claimant's] pulmonary function tests were performed with more complete efforts at the time of my evaluation, he had no significant obstruction." Further, it should be noted that the PFS administered by Dr. Simpao was invalidated by Dr. Vuskovich on May 29, 2004. DX-12. Dr.

Vuskovich, like Dr. Rosenberg, noted a concern regarding maximum effort by the Claimant. DX-12 at 3.

There are contrary opinions by two physicians of record. Dr. Rosenberg is Board-certified in Internal Medicine, Pulmonary Disease, and Occupational Medicine. EX-2. His opinion is entitled to enhanced weight because of his qualifications. Dr. Simpao's credentials are not contained in the record. In addition, Dr. Rosenberg's opinion is well-documented and reasoned, and fully supported by the preponderance of the X-ray and CT scan evidence. I find that after weighing all of the relevant evidence of record, Claimant has not met his burden in establishing that he has pneumoconiosis by a reasoned medical opinion.

2) Whether Pneumoconiosis "Arose Out of" Coal Mine Employment

The Regulations mandate that in order for a claimant to succeed on a claim for benefits under the Act, "it must be determined that the miner's pneumoconiosis arose at least in part out of coal mine employment." 20 C.F.R. §718.203(a). There is a rebuttable presumption that the pneumoconiosis arose out of coal mine employment if a miner who is or was suffering from pneumoconiosis was employed for ten years or more in one or more coal mines. 20 C.F.R. §718.203(b); §718.302. The parties stipulated that Claimant has twenty one (21) years of coal mine employment. Tr. at 5. That stipulation is consistent with the OWCP's finding in its Proposed Decision and Order. DX-26 at 3. However, as Claimant has failed to establish the presence of the disease, the presumption does not apply. Assuming, *arguendo*, that Claimant had established the presence of the disease, the presumption would have been triggered and I would have found that Employer had not sufficiently rebutted it.

3) Whether Claimant is Totally Disabled

In addition to establishing the presence of coal workers' pneumoconiosis, in order for a claimant to prevail under the Act, he or she must establish that they are totally disabled due to a respiratory or pulmonary condition. 20 C.F.R. §718.204(a). A miner is considered totally disabled within the Act if "the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner:

> (i) From performing his or her usual coal mine work; and
> (ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time."

20 C.F.R. §718.204(b)(1). The regulations at §718.204(b) provide the following five methods to establish total disability: (a) pulmonary function studies; (b) arterial blood gas studies; (c) evidence of cor pulmonale with right-sided congestive heart failure; (d) reasoned medical opinions; and (e) lay testimony. 20 C.F.R. §§718.204(b)(2) and (d). However, in a living miner's claim, a finding of total disability due to pneumoconiosis shall not be made solely on the miner's statements or testimony. 20 C.F.R. §718.204(d)(5); Tedesco v. Director, OWCP, 18

B.L.R. 1-103 (1994). Further, a presumption of total disability is not established by a showing of evidence qualifying under a subsection of §718.204(b)(2), but rather such evidence shall establish total disability in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

a) Pulmonary Function Studies

In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, after accounting for sex, age, and height, produce a qualifying value for the FEV1 test, and produce either a qualifying value for the FVC test or the MVV test, or produce a value of FEV1 divided by the FVC less than or equal to 55 percent. "Qualifying values" for the FEV1, FVC and the MVV tests are measured results less than or equal to values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718, 20 C.F.R. §718.204(b)(2)(i).

The following pulmonary function studies ("PFSs") are contained in the record:

Date	EX. No.	Physician	Age/ Ht.	FEV_1	FVC	MVV	FEV_1/FVC	Effort	Qualifies
01/15/04	DX-10	Simpao	45 71"	2.45	3.83	32	64%	Good	**NO** FEV_1: 2.37
07/30/04	EX-1	Rosenberg	46 72"	2.97 3.19*	4.40 4.27*	46 44*	67% 75%	Fair	**NO** FEV_1: 2.44

* post bronchodilator and/or exercise

As the preceding table demonstrates, the record contains no PFSs which produced qualifying values under the regulations. Accordingly, Claimant has not demonstrated total disability with pulmonary function study evidence.

b) Arterial Blood Gas Studies

To establish total disability based on Arterial Blood Gas Studies, the test must produce the totals presented in the Appendix C to 20 C.F.R. Part 718, 20 C.F.R. §718.204(b)(2)(ii).

The record contains the following arterial blood gas study ("ABGs") evidence summarized below:

Date	EX. No.	Physician	Altitude	pCO_2	pO_2	Qualifies[6]
01/15/04	DX-10	Simpao	0 to 2999 ft.	41.2	98.1	**NO** (60)
06/14/04	EX-1	Rosenberg	Not reported	35.1	91.2	**NO** (65)

[6] In order to qualify for total disability under arterial blood gas studies, Claimant's pCO_2 value would have to be equal to or lower than the given pO_2 levels found in the "Qualifies" column of this chart.

As the preceding chart demonstrates, none of the ABGs submitted have produced qualifying values within the regulations. Accordingly, Claimant has not demonstrated total disability with arterial blood gas evidence.

c) Cor Pulmonale Diagnosis

A miner may demonstrate total disability with, in addition to pneumoconiosis, medical evidence of cor pulmonale with right-sided heart failure. 20 C.F.R. §718.204(b)(2)(iii).

There is no evidence of cor pulmonale with right-sided congestive heart failure in the record. Accordingly, I find that Claimant has not demonstrated total disability pursuant to §718.204(b)(2)(iii).

d) Reasoned Medical Opinion

The fourth method for determining total disability is through the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful employment. Such an opinion must be based on acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(iv). A reasoned opinion is one that contains underlying documentation adequate to support the physician's conclusions. Field v. Island Creek Coal Co., 10 BLR 1-19, 1-22 (BRB 1987). Proper documentation exists where the physician sets forth the clinical findings, observations, facts and other data on which he bases his diagnosis. Id. An unreasoned or undocumented opinion may be given little or no weight. Clark v. Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (BRB 1989).

In his medical report dated January 15, 2004, Dr. Simpao diagnosed Claimant with a moderate cardiopulmonary impairment. DX-10 at 23. I infer from his report that Dr. Simpao based this diagnosis upon the PFS that he administered on the same day. Dr. Simpao reported that the results of the PFS demonstrated "mild degree restrictive and obstructive airway disease." DX-10 at 22. In a report filed June 21, 2004, Dr. Vuskovich invalidated the results of the PFS administered by Dr. Simpao. DX-12 at 3. "Lack of maximum effort throughout the entire forced expiration maneuver" was given as one of the reasons for invalidation. Id. Dr. Rosenberg corroborated this position in his report. He noted that the PFS from January 15, 2004 was "performed with incomplete efforts" and was "not accurate to assess a degree of impairment." EX-1. Claimant has failed to attempt to either rehabilitate Dr. Simpao's opinion or corroborate it with another physician's opinion. Because the results of the PFS he relied upon for his diagnosis have been invalidated by two physicians, I find that Dr. Simpao's opinion is neither well-reasoned nor well-documented. His opinion is compromised because he relies on an invalidated PFS and does not further explain his diagnosis.

In contrast, Dr. Rosenberg also evaluated Claimant and found that Claimant "has no impairments which would prevent him from performing his previous coal mining job." EX-1. Dr. Rosenberg's opinion is based on clinical testing that he administered and documented. I find

that his opinion is adequately supported by his findings and observations, and is well-documented and reasoned. Accordingly, I find that the preponderance of the 20 C.F.R. §718.204(b)(2)(iv) evidence does not demonstrate that Claimant is totally disabled.

e) Lay Testimony

Claimant testified that he currently suffers from shortness of breath. Tr. at 24. He testified that he left the coal mining industry because of an arm or shoulder injury. Tr. at 21.

f) Weighing of the Total Disability Evidence

As has been discussed, Claimant has not demonstrated total disability under §§718.204(b)(2)(i), (ii), (iii), or (iv). I further find that his testimony does not sustain a finding of total disability.[7] Accordingly, after weighing all of the relevant total disability evidence, I find that Claimant has not established that he is totally disabled.

4) Whether Pneumoconiosis Contributes to Total Disability

The amended regulations at Part 725 mandate that a miner is eligible for benefits if his "pneumoconiosis contributes to [his] total disability." 20 C.F.R. §725.202(d)(2)(iv). "Total disability due to pneumoconiosis"[8] is defined at 20 C.F.R. §718.204(c) as follows:

> (1) A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis…is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i) and (ii); See also Lollar v. Alabama By-Products Corp., 893 F.2d 1258 (11th Cir. 1990) (the "due to pneumoconiosis" requirement demands evidence that "pneumoconiosis was a substantial contributing factor in the causation of the [miner's] total pulmonary disability"). Claimant bears the burden of establishing total disability due to pneumoconiosis by a preponderance of the evidence. Baumgartner v. Director, OWCP, 9 B.L.R. 1-65, 1-66 (1986).

[7] Which is immaterial because, in a living miner's claim, lay testimony cannot support a finding of a totally disabling respiratory impairment in the absence of corroborating medical evidence. See Madden v. Gopher Mining Co., 21 B.L.R. 1-122 (1999). No such credible evidence has been offered.

[8] I note that although there exists an ambiguity in the language of the analysis, 20 C.F.R. §725.202(d)(2)(iv) cross-references 20 C.F.R. §718.204(c).

Because Claimant has failed to establish both the presence of pneumoconiosis and a totally disabling impairment, he cannot establish the fourth element of entitlement.

III. CONCLUSION

Based upon my review of all of the evidence, I find that Claimant has failed to establish any and all of the elements of entitlement. Accordingly, his claim for benefits under the Act must be denied.

IV. ATTORNEY'S FEE

The award of an attorney's fee is permitted only in cases in which Claimant is found to be entitled to benefits under the Act. Since benefits are not awarded in this claim, the Act prohibits the charging of any fee to Claimant for representation services rendered in pursuit of the claim.

ORDER

The claim of BENNY R. HARRIS for benefits under the Act is hereby DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. §725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. §725.479(a).